

STATE OF MICHIGAN
COURT OF APPEALS

ROD KILLIPS and STEPHANIE KILLIPS,

Plaintiffs/Counter-Defendants-
Appellees,

v

RITA M. MANNISTO,

Defendant/Counter-Plaintiff-
Appellant.

FOR PUBLICATION
January 5, 2001
9:00 a.m.

No. 223089
Alger Circuit Court
LC No. 99-003297-CZ

Updated Copy
March 16, 2001

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

HOEKSTRA, J., (*dissenting*).

I respectfully dissent from the majority opinion because I conclude that acquiescence is not applicable to this case and that plaintiffs did not establish the hostile use element of a prescriptive easement.

Turning first to acquiescence, I agree with the majority when it states that acquiescence is a doctrine of property law that is applicable to boundary line disputes and that the reason for the rule is to promote peaceful resolution of boundary line disputes. What the trial court and the majority fail to acknowledge is that this case is not a boundary line dispute. The parties here are not litigating where the line between their property lies; rather, they are arguing about whether plaintiff can use for a driveway a triangular strip of land that is on defendant's side of the established boundary. Accordingly, acquiescence is not available to assist the parties in resolving

their dispute. Indeed, plaintiffs must have recognized the inapplicability of acquiescence because they did not plead acquiescence in their complaint, nor did they argue it in their trial brief.

With regard to plaintiffs' prescriptive easement claim, this case turns on whether plaintiffs' use of the disputed property was legally hostile. The trial court found that from the date plaintiffs purchased the property until defendant attempted to assert her exclusive ownership interest over it, plaintiffs used the disputed land as part of their driveway under the mistaken belief that an easement existed that permitted that use by them. Unlike the majority, I believe that use based upon a perceived, but ultimately mistaken belief that it was lawful, is inconsistent with legal hostility. Plaintiffs' belief that an easement existed and that therefore their use was lawful is tantamount to use by permission, which can never result in a prescriptive easement. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995).

/s/ Joel P. Hoekstra